5 CONS – Minot AFB, North Dakota

Integrity - Service - Excellence

Protest Procedures

U.S. AIR FORCE

Objectives

- Define basic facts and terms concerning protests
- Discuss protests to the agency
- Discuss protests to the GAO
- Prepare an agency report
- Describe the process after the report is filed
- List the methods used to resolve protests

Definitions

- **“Protest” means a written objection by an interested party to any of the following:**
  - **Objection to cancellation of solicitation or other request**
  - **An award or proposed award of contract**
  - **Termination or cancellation of an award of contract**
  - **Exclusion from the “competitive range”**

- **An “interested party” is defined to include any offeror or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to make the award**

Protests

- **Covered in FAR Part 33 and supplements**
- **Common grounds for protest:**
  - **Improper agency evaluation**
  - **Lack of meaningful discussions**
  - **Defects in solicitation**
  - **Cancellation of a solicitation**
  - **Improper exclusion from the competitive range**
  - **Changes**
  - **Bias or bad faith on the party of the agency**

Time for Filing

- **Improprieties in solicitation**
  - **Protest must be filed prior to bid opening or prior to the time designated for receipt of initial proposals**
- **General rule**
  - **The timeframe for filing a protest is *10 calendar days* after the grounds for protest were known or should have been known**
- **Protests filed late**
  - **Although rare, a protest filed late can be heard by the GAO if it involves significant issues**

Protest to the Agency

- **Provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, in other words try to resolve at lowest level**

- **Goals of the agency**
  - **Build confidence in the Government's acquisition system**
  - **Reduce protests to the GAO**

- **Resolve protests within *35 days* after the protest is filed**

Protest to the Agency

- **The CO with concurrence of the contracting squadron commander is authorized to render final decisions denying protests lodged at the contracting office level**

- **Make verbal notification to HQ ACC/LGCA after receipt of the protest**

- **Forward a copy of all applicable documents to HQ ACC/LGCA as required**

Protest to the Agency

- **Protest shall include the following information:**
  - **Name, address, and fax and telephone numbers of protester**
  - **Solicitation or contract number**
  - **Detailed statement of legal and factual grounds for the protest, to include a description of resulting prejudice to the protester**
  - **Copies of relevant documents**
  - **Request for a ruling by agency**
  - **Statement as to the form of relief requested**
  - **All information establishing protester as an interested party**
  - **All information establishing the timeliness of the protest**
- **Failure to substantially comply with the above info may be grounds for dismissal of the protest**

Protest to the Agency

- **Protests Before Award:**

- **Protests that contain alleged problems in a solicitation shall be filed prior to bid opening or closing date for receipt of proposals**

- **All other protests to the agency shall be filed no later than *ten days* after the basis of the protest is known or should have been known, (whichever is earlier)**

- **Exception: protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required**

Protest to the Agency

- **Action to take upon receipt of protest:**
  - **Don’t award contract unless it’s justified in writing that its urgent and compelling**
  - **Inform offerors whose offers might be eligible for award**
  - **If required, request bid acceptance time**

Protest to the Agency

- **Protests After Award:**
- **A protest after award must be filed within 10 days after contract award, or within *five days* after a debriefing date, whichever is later**
- **CO shall immediately suspend performance or terminate the awarded contract**
- **HCA may authorize contract performance**
  - **Best interest of the United States**
  - **Urgent and compelling circumstances**

Protest to the GAO

- **When a protest is filed, the protester must notify the CO within *one day* of filing with GAO**
  - **GAO may dismiss the protest if protester fails to furnish a copy within the 1 day**
- **The GAO's will provide written notice that a protest has been filed**
- **The Air Force response to a GAO bid protest must comply with GAO's bid protest regulations (4 C.F.R. § 21), FAR and its respective supplements**

Protest to the GAO

- **The CO should:**
  - **Within *one business day* of receiving the protest:**
    - **Forward a copy to the legal office**
    - **Provide a copy of the protest to the awardee, or if no award has been made, to all offerors who appear to have a reasonable prospect of receiving award**
  - ***Immediately* after receiving the protest:**
    - **Verbally notify HQ ACC/LGCA of all field protests**
    - **Copy all applicable documents and forward to HQ ACC/LGCA for informational purposes**

Protest to the GAO

- **The CO should, *immediately* after receiving the protest, consult with the cognizant legal office to determine:**
  - **Whether a stay of performance or award is required**
  - **If a stay is required, whether an override will be sought**
  - **If a stay is not required, whether a suspension of performance or termination of the contract is in the best interest of the Air Force**
  - **Whether corrective action should be taken**
  - **Whether summary dismissal should be requested**

- **The CO should, within *10 days* after the Air Force receives the protest, provide the statement of facts and table of contents to the cognizant legal office**

Protest to the GAO

- **Contact HQ ACC/LGCA:**
  - **If the CO or SJA believes the Air Force should request a summary dismissal**
  - **To request status or ask questions on protests pending at GAO**
  - **If there is an actual or imminent protest to GAO**
  - **To request time extensions**

- **Contracting offices shall coordinate with the Director of IM and/or Air Postal Service to establish transmittal of files**

Preparation of Agency Report

- **Format:**
  - **CO should prepare the agency report as a stand-alone report that can be submitted "as is" by SAF/AQCX or SAF/GCQ to the GAO**
  - **CO should prepare complete copies of the agency report for**
    - **GAO**
    - **Protestor**
    - **Each interested party**
    - **Either SAF/AQCX or SAF/GCQ**
    - **HQ ACC/LGCA (focal point)**
  - **CO should submit copies of the agency report:**
    - **In a 3-ring binder (not contract folders)**
    - **Each binder should be labeled with protestor's name, contract number and name of intended recipient**

Preparation of Agency Report

- **The table of contents should have *five* columns**
- **Documents should be numbered, tabbed and identified in the table of contents**
  - **Tab 1 should contain the legal memorandum**
  - **Tab 2 should contain the contracting officer's statement of facts**
  - **Tab 3 should contain a copy of the protest**

Preparation of Agency Report

TABLE OF CONTENTS

TAB	DOCUMENT	DATE	WITHHELD FROM	PROTECTED
1	Legal Memorandum	1 Oct XX	Contractor	Yes
2	Contracting Officer's Statement of Facts	15 Oct XX	N/A	No
3	Protest	25 Sep XX	N/A	No
4	Agency Report	15 Oct XX	Contractor	Yes
5	Proprietary or Source Selection Information	1 Oct XX	Contractor	Yes

Preparation of Agency Report

- **Contents**
  - **Legal Memorandum**
    - **The cognizant legal office will prepare the legal memorandum, which will include a legal analysis of each ground of protest**
  - **Contracting Officer's Statement of Facts**
    - **Actual drafting is the CO's responsibility**
    - **The statement of facts should be written in narrative form and contain three sections: overview of procurement, chronology of events and response to all allegations raised in the protest**

Preparation of Agency Report

- **Contracting officer's statement of facts:**
  - **First section contains a one paragraph overview of the procurement:**
    - **Type of solicitation protested**
    - **Solicitation number and date issued**
    - **Description of goods or services being acquired**
    - **Description of the decision protested**
    - **Name of the successful contractor, if known**
    - **Amount of contract, as awarded with options**
    - **Other pertinent background information**

Preparation of Agency Report

- **Contracting officer's statement of facts:**
  - **Second section provides a chronology of events that includes a date and a brief description of significant events in the procurement:**
    - **Date bids or proposals were originally due**
    - **Date final proposal revision requested**
    - **Date final proposal revision received**
    - **Date of final award**
    - **Other pertinent dates**

Preparation of Agency Report

- **Contracting officer's statement of facts:**
  - **Third section describes and respond to all allegations raised in the protest**
    - **Address each allegation separately**
    - **Cite specific language or facts relied upon by the protest and relevant language or facts supporting the Air Force position**
    - **Appropriate references to the FAR should also be made**
- **References to documents contained elsewhere in the agency report should be followed by citations, including tab number and page number**

Preparation of Agency Report

- **Other documents:**
  - **Agency report should include, as appropriate:**
    - **Bid or proposal submitted by the protester**
    - **Bid or proposal of the firm which being considered for award or whose bid or proposal is being protested**
    - **All evaluation documents (including individual evaluator ratings, scores, analyses, worksheets, and interim and final ratings)**
    - **Solicitation, including amendments**
    - **Source selection and technical plans**
    - **Abstract of bids or offers**
    - **Any other relevant documents that would tend to explain the award decision or the adverse action taken with respect to the offeror's proposal**

Preparation of Agency Report

- **Proprietary or Source Selection Information:**
  - **CO should review all documents for proprietary or source selection information**
  - **Any document containing such information must be designated as "protected" in the table of contents**
  - **Protected documents include, among other things:**
    - **Any proposal or document submitted by an offeror (including the protestor) containing confidential commercial or financial information**
    - **Interim or final ratings of any offeror (including those contained in summary documents such as a competitive range determinations, source selection decision documents, or proposal assessment reports)**
    - **Past performance information of any offeror (including the protester)**
    - **Any other "source selection information" and "contractor bid and proposal information" as defined by FAR 3.104-3**

Protective Order

- **GAO will usually issue a protective order in a protest involving protected information**
- **When an attorney represents the protester, AFLSA/JACN will forward the protester's copy of the agency report directly to the attorney**
- **In the absence of a protective order, the contracting officer may include protected documents in agency reports or subsequent filings by redacting the material considered proprietary or source selection sensitive (In such cases, provide both original and redacted versions to SAF/AQCX (or AFLSA/JACNSAF/GCQ) and GAO)**

Transmission of Agency Report

- **CO should:**
  - **E-mail the statement of the facts and the table of contents to SAF/AQCX (copying the HQ ACC/LGCA focal point) not less than *15 days* after the AF is notified of the protest (or *seven days* from the date the express option is invoked by the GAO)**
  - **Transmit all copies of the agency report**
    - **One for the protester**
    - **One for each interested party**
    - **One for the GAO**
    - **One either for SAF/AQCX**

Process After Agency Report is Filed

- **Comments on the agency report**
  - **Protester and all interested parties may file written comments on the agency report within *10 days* of receiving the report**
- **Supplemental protests**
  - **Based on the information contained in the agency report, the protester may assert supplemental grounds of protest**
- **Hearings**
  - **The GAO or any party to a protest may request a hearing in the protest**

Resolving the Protest

- **GAO Decision**
- **Alternative Dispute Resolution “ADR”**
- **Outcome Prediction**
- **Settlement**
- **Withdrawal**

GAO Decision

- **GAO decision time**
  - **The GAO has *100 calendar days* to make a decision from the time a protest is filed or *65 days* if the *express* option is used**
    - **Denial or Dismissal**
    - **Sustain**

- **Notice to GAO**
  - **The agency has to implement the GAO's decision within *60 days* of receiving the GAO's decision**

Corrective Action

- **May be taken by the Air Force at any time**
- **Is appropriate when a significant flaw in the procurement process is discovered or when GAO precedent suggests that the protest is sustained**
- **Is important to minimize costs to the Air Force**
- **Reporting requirements are identified in AFFARS 5333.104-90(c)**

Hungry for More?

Check out prior protest decisions at:

http://www.gao.gov/decisions/bidpro/bidpro.htm

Summary

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